BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE K. SOMMERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,006,366
FUTURE BEEF OPERATIONS	)	
Respondent	)	
AND	)	
	)	
EMPLOYERS INSURANCE COMPANY	)	
OF WAUSAU	)	
Insurance Carrier	)	

ORDER

Respondent appeals the November 18, 2003 Award of Special Administrative Law Judge Jeff K. Cooper. The Appeals Board (Board) held oral argument on April 27, 2004.

APPEARANCES

Claimant appeared by his attorney, Joni J. Franklin of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Crystal Nesheim of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Special Administrative Law Judge. Additionally, at oral argument, the parties stipulated to claimant's average weekly wage as was determined by the Special Administrative Law Judge. The Board, therefore, finds that claimant's wage for straight time is $420 ($10.50 x 40 hours per week), plus overtime of $25.59, for an average weekly wage of $445.59. This equates to a temporary total disability rate of $297.07. As claimant was paid 14.29 weeks temporary total disability compensation at the rate of $273.35 per week, this computes to an underpayment of $23.72 per week, for a total underpayment of $338.96. As noted in the award section, the Special Administrative Law Judge granted claimant temporary total disability benefits at the appropriate rate and for the appropriate number of weeks. Therefore, the dispute regarding temporary total disability compensation is no longer before the Board for its consideration.

ISSUES

What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Board finds as follows:

Claimant began working for respondent as a meat trimmer in 1995. On July 19, 2002, while working in respondent's plant, claimant slipped on a wet floor, falling and fracturing both his left hip and his left wrist. He came under the care of board certified orthopedic surgeon Christopher W. Siwek, M.D. Dr. Siwek performed surgery on claimant's left hip and placed his left arm in a cast. Claimant's recovery from the surgery to his hip was deemed excellent. Claimant's range of motion in the hip was normal, he was having no difficulty walking and claimant was returned to work without restrictions. Claimant had some residual problems with the left arm for which he was referred to physical therapy. Ultimately, Dr. Siwek released claimant from the left arm treatment without restrictions, finding claimant's left upper extremity range of motion to be the same as the right upper extremity range of motion. Dr. Siwek opined that claimant had a 2 percent impairment to the body as a whole for the hip and an 8 percent impairment to the left upper extremity for the left wrist, which converts to a 5 percent impairment to the body as a whole based upon the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). In the Award, the Special Administrative Law Judge found that Dr. Siwek had only provided a 2 percent impairment to the body as a whole for all of claimant's injuries. That error is corrected herein.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on November 22, 2002. Dr. Murati found claimant unable to walk without steadying himself using a cane, finding that claimant was experiencing tingling and numbness in his left foot and ankle and left wrist pain. He opined claimant had suffered a 33 percent loss of grip strength in claimant's left wrist, which equates to a 20 percent impairment to the left upper extremity. Dr. Murati also opined claimant had suffered a 10 percent impairment to claimant's left upper extremity due to loss of range of motion in the wrist and a 4 percent impairment to the left upper extremity due to loss of range of motion in the left elbow, which, all combined, equates to a 31 percent left upper extremity impairment or a 19 percent impairment to the body as a whole. He also opined claimant had suffered a 27 percent impairment to the left lower extremity due to range of motion limitations in the hip, which converts to an 11 percent whole body impairment. Dr. Murati's total impairment equates to a 28 percent impairment to the body as a whole based upon the AMA *Guides* (4th ed.).

Dr. Siwek determined that because claimant had no permanent restrictions, he had suffered no task loss as a result of the injuries of July 19, 2002. Dr. Murati, in looking over the task loss opinion of vocational expert Jerry D. Hardin, determined that claimant was incapable of performing sixteen of twenty-nine tasks, for a 55 percent task loss.

Claimant was unable to return to his employment with respondent, as, shortly after claimant's injury, respondent's plant closed due to economic difficulties. Claimant testified that he undertook an extensive job search at that time, trying to locate employment within his restrictions. However, it was noted claimant only submitted two applications in the time leading up to the May 2003 regular hearing. One application was at the Sheriff's Office and the other one was with Rubbermaid. Claimant testified that he applied at Clear Creak, respondent's successor, and also at the Arnold Group, although, on cross-examination, it was unclear whether he had already applied with the Arnold Group or whether he was intending to apply. Claimant testified that he rejected attempts at locating jobs in Wellington, Kansas, as he felt it was too far to drive. Wellington is approximately 24 miles from Winfield, Kansas, which is where claimant lives. He also refused to apply for jobs at the Country Club because he did not believe in drinking and he refused to apply for jobs which would have required him to drive to Oxford, Kansas, which is slightly over 11 miles from Winfield. Claimant placed into the record Xerox copies of job listings from a newspaper.[1] However, it is unclear from the record whether these job listings come from the same newspaper on the same day or from the same newspaper over several days or from different newspapers. Claimant testified that he checked the jobs he thought he could do. However, on cross-examination, he acknowledged there were numerous jobs contained in those Xerox copies of job advertisements that he was physically unable to perform. It is unclear from the record just how many jobs claimant actually applied for.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[2]

Dr. Murati opined that claimant had suffered a 28 percent impairment to the body as a whole for the multitude of injuries and limitations Dr. Murati diagnosed. The Board finds the opinion of Dr. Siwek, who had the opportunity to examine and treat claimant over a period of several months, is the more credible opinion. The Board, therefore, adopts the opinion of Dr. Siwek and awards claimant a 7 percent impairment to the body as a whole for the injuries suffered on July 19, 2002.

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and

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[1] R.H. Trans., Cl. Ex. 2.

[2] K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[3]

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.[4]

The record contains two task loss opinions. Dr. Siwek opined that claimant required no restrictions and thus had suffered no task loss. Dr. Murati opined that claimant had lost the ability to perform 55 percent of his prior tasks, after considering the task list created by vocational expert Jerry D. Hardin. The Special Administrative Law Judge found Dr. Siwek's opinion to be too conservative and Dr. Murati's too liberal. The Judge then determined that an appropriate result would be to average the two opinions resulting in a 27.5 percent task loss. The Board finds the record supports that determination and affirms that finding.

K.S.A. 44-510e requires that a claimant's task loss be averaged together with the difference between his or her average weekly wage at the time of the injury and the average weekly wage that the worker is earning after the injury. However, that section of K.S.A. 44-510e must considered in light of the policies set forth in *Foulk*[5] and *Copeland.*[6] The Kansas appellate courts have barred claimants from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his or her pre-injury average weekly wage at a job within his or her medical restrictions, but fails to do so, or actually or constructively refuses to do so.[7] The rationale behind that decision is that claimants should be prevented from refusing work and, thereby, exploiting the workers' compensation system. In this instance, however, the Board does not find that *Foulk* applies, as there was no job available to claimant within respondent's employment, as respondent's plant shut down during the time claimant was receiving treatment for his injuries. Claimant, therefore, did not refuse any offers of employment.

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[3] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[4] K.S.A. 44-510e.

[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Foulk, supra*.

The Board must, however, also consider the policies set forth in *Copeland*. Before a claimant can claim entitlement to a work disability, he must establish that he has made a good faith effort to obtain or retain appropriate employment. A failure to do so will mandate that the trier of fact must determine and impute an appropriate post-injury wage based upon all of the evidence before it. Here, claimant, over a several-month period, submitted only two applications for jobs. While claimant did sign up with the Job Corps (Job Services) and may have signed up with the Arnold Group, it does not appear that claimant's job search was extensive. The evidence placed into the record by claimant at the regular hearing, including the Xerox copies of multiple job ads from a local newspaper, does not convince the Board that claimant's efforts were sincere. Most of the jobs contained in Claimant's Exhibit 2[8] were jobs for which claimant was unqualified. Claimant acknowledged that he only checked the jobs he thought he could do, but he then failed to discuss in the record which, if any, of those jobs he actually pursued regarding possible employment. The Board finds that claimant, in this instance, failed to put forth a good faith effort to find employment and, therefore, a wage should be imputed to claimant.

Two vocational experts expressed opinions in this record regarding claimant's ability to perform work and earn wages. Jerry D. Hardin, claimant's vocational rehabilitation expert, testified that claimant was capable of earning $280 per week. Dan Zumwalt, respondent's vocational rehabilitation expert, testified that claimant was capable of making $7 to $8 an hour, which computes to $280 to $320 per week. The Board finds claimant has the ability to earn $300 per week and will impute that amount pursuant to K.S.A. 44-510e. This, when compared to claimant's average weekly wage of $445.59, creates a 33 percent wage loss pursuant to K.S.A. 44-510e. When averaging both claimant's task and wage losses, the Board finds claimant has suffered a permanent partial general disability of 44 percent to the body as a whole.

The Board, therefore, finds that the Award of the Administrative Law Judge should be modified from a 63.75 percent permanent partial general disability to award claimant a permanent partial general disability of 44 percent to the body as a whole, but, in all other regards, should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Jeff K. Cooper dated November 18, 2003, should be, and is hereby, modified, and an award is granted in favor of the claimant, George K. Sommers, and against the respondent, Future Beef Operations, and its insurance carrier, Employers Insurance Company of Wausau, for a 44 percent permanent

[8] R.H. Trans., Cl. Ex. 2.

partial general disability to the body as a whole, for an injury occurring on July 19, 2002, and based upon an average weekly wage of $445.59.

Claimant is entitled to 14.29 weeks of temporary total disability compensation at the rate of $297.07 per week totaling $4,245.13, followed by 182.6 weeks of permanent partial general disability compensation at the rate of $297.07 per week totaling $54,244.98, for a total award of $58,490.11.

As of April 28, 2004, there would be due and owing claimant 14.29 weeks of temporary total disability compensation at the rate of $297.07 per week totaling $4,245.13, followed by 78.42 weeks of permanent partial general disability compensation at the rate of $297.07 per week totaling $23,296.23, for a total due and owing of $27,541.36, which is ordered paid in one lump sum minus any amounts previously paid. Thereinafter, claimant is entitled to 104.18 weeks permanent partial general disability compensation at the rate of $297.07 per week totaling $30,948.75, until fully paid or further order of the Director.

In all other regards, the Award of the Special Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joni J. Franklin, Attorney for Claimant
Crystal Nesheim, Attorney for Respondent
Jeff K. Cooper, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director